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Nos. 02-1215 and 02-1265

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SEA ROBIN PIPELINE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Where the Federal Energy Regulatory Commission ("FERC") does in fact regulate Respondent Sea Robin Pipeline Company's rates under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (2000), and where FERC approved a rate settlement between Sea Robin and the parties below (including most Petitioners) which is binding on *all* parties, are these cases unripe, or moot?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent Sea Robin Pipeline Company states that it is a wholly owned subsidiary of CMS Energy Corporation, a publicly traded company. The only other affiliates of Sea Robin Pipeline Company which have issued shares or debt securities to the public are Consumers Energy Company and Panhandle Eastern Pipe Line Company.

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STATUTES INVOLVED

In addition to the statutes included in the Petitions, these cases also involved Section 5 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d (2000), and a provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (2000). They are reproduced in the Appendix.

STATEMENT

The facilities of Respondent Sea Robin Pipeline Company ("Sea Robin") are at issue in these cases. Both Petitions proceed from a fundamentally mistaken premise. Consequently, a comprehensive brief in opposition is unnecessary.

REASONS FOR DENYING THE WRIT

1. Both Petitions claim that Respondent Federal Energy Regulatory Commission ("FERC"), as a result of its various orders below, does not assert rate regulation over Sea Robin's offshore production and gathering facilities under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (2000)("NGA"). *See, e.g.*, Petition of The Producers Coalition in No. 02-1215 at 9 ("By withdrawing important federal safeguards that protect captive [Outer Continental Shelf] gas producers against the exercise of monopoly power by OCS pipelines, the FERC's orders at issue undermine Congress' purpose to afford consumers of interstate gas services a "complete, permanent and effective bond of protection from excessive rates and charges [footnote omitted]"); *see also id.* at 15; *see* Petition of ExxonMobil Marketing Company, *et al.* in No. 02-1265 ("ExxonMobil Pet." at 10, 28) ("Moreover, the only purpose for which pipelines like Sea Robin seek reclassification is to avoid rate regulation."). Both Petitions therefore seek this Court's review because they complain that the effect of FERC's orders, as affirmed by the Court of Appeals, deprives them of statutory rate protection under the NGA.

2. However, in an order dated February 15, 2001 in Docket No. CP95-168-005, FERC held that Sea Robin's offshore facilities *are* subject to Sections 4 and 5 of the NGA, 15 U.S.C §§ 717c and 717d (2000). *Sea Robin Pipeline Co.*, 94 F.E.R.C. ¶ 61,137 (2001).[1] That order is final, was not appealed by any party, is no longer appealable, and was not cited in either Petition. Accordingly, Sea Robin's offshore

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[1] *See* FERC's June 30, 1999 Order on Remand from the decision of the Fifth Circuit Ordering ¶ (C)(ExxonMobil Pet. at 93a), subjecting Sea Robin's Outer Continental Shelf ("OCS") facilities to NGA rate regulation and requiring Sea Robin to file tariffs reflecting its offshore gathering rates. It was that Ordering ¶ (C) paragraph that led to the February 15, 2001 FERC order and resulting settlement agreement process described in ¶¶ 2 and 3 of this Brief.

facilities are considered by FERC to be subject to the very rate-regulatory provisions of the NGA to which Petitioners would have this Court subject them.

3. Even more remarkably, Petitioners (or their affiliated or predecessor interests) and Sea Robin subsequently entered into a settlement agreement, approved by FERC, agreeing to rates with respect to Sea Robin's gathering facilities, to implement FERC's February 15, 2001 order discussed *supra* in ¶ 2. *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 61,263 (2002), *approving Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 63,023 (2002); *see id.* at n.2 (listing parties to settlement agreement, including Petitioners). The existence of that settlement agreement, and the fact that Petitioners (or their related interests) are subject to it, also were not disclosed in either Petition. All parties below are bound by the settlement agreement. Those facts also make moot ExxonMobil's second question presented, for if Sea Robin's offshore facilities are, indeed, subject to rate regulation under the NGA, whether or not FERC earlier should have required Sea Robin to obtain abandonment authority under the NGA for the subject facilities is of no consequence to Petitioners, at least so long as Sea Robin continues to own them.

4. The arcane issues raised in the Petitions are of only academic interest in the context of these cases, and need not be addressed. Sea Robin agrees with the opinion of the majority of the United States Court of Appeals for the D.C. Circuit below (*see* ExxonMobil Pet. at 1a-27a), and therefore considers it unnecessary to respond in detail to Petitioners' arguments on the merits. Suffice to say that the D.C. Circuit majority applied this Court's opinion in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963), in a manner that is faithful to its holding. *See, e.g.*, ExxonMobil Pet. at 20a. If this Court were to reach the merits, the majority decision of the D.C. Circuit should be affirmed. If the Court were to reach the merits, it would

conclude, we respectfully submit, as the D.C. Circuit and the Fifth Circuit essentially concluded, that the issues under Section 1(b) of the NGA are intensely factual and *sui generis*. Therefore, any decision on the merits would necessarily follow *Northern Natural*, because it followed the statute, and would thus be of limited additional precedential value.

5. Petitioners would also have this Court grant the writ because of the alleged importance to production of gas on the Outer Continental Shelf of a ruling whether OCS facilities are subject to NGA rate regulation. But this claim is a vast overstatement. FERC has elsewhere found that 50 percent of OCS gas is not subject to the NGA in any event, because it is owned by entities like Petitioners rather than by entities such as Sea Robin. *Regulations Under the Outer Continental Shelf Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639, F.E.R.C. Stats. & Regs. Regs. Preambles [1996-2000] ¶ 31, 097, *order on reh'g*, Order No. 639-A, F.E.R.C. Stats. & Regs. Regs. Preambles [19976-2000] ¶31,103 (2000) at p. 31,674, *order denying clarification*, 93 F.E.R.C. ¶ 61,274 (2000), *vacated and enjoined, Chevron U.S.A. Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal docketed sub nom. The Williams Cos. V. FERC*, No. 02-5056 (D.C. Cir., Feb. 5, 2002).[2]

6. Accordingly, the issues raised in both Petitions are unripe, or moot, because their fundamental premise, that Sea Robin's offshore facilities are *not* subject to rate regulation

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[2] But in any event Petitioners' claim of importance is incorrect, because any OCS facility not subject to NGA rate regulation is subject to the anti-discrimination provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334 (2000), a point not discussed in the Petition in No. 02-1215, and alluded to only obliquely in ExxonMobil's Pet. at 28a. Even though FERC's OCSLA regulations are stayed (*see supra* ¶5), FERC retains statutory authority under the OCSLA and could regulate on a case-by-case basis. Thus, there is no "regulatory gap" created by the decisions at issue.

under the NGA, is mistaken. In any event, the majority decision of the D.C. Circuit was correct.

CONCLUSION

For the reasons stated herein, these cases are not appropriate for review by this Court, and the Petitions should be denied.

Respectfully submitted,

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